Supreme Court, U.S.
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No. 00-1279

IN THE

Supreme Court of the United States

HOUSEHOLD INTERNATIONAL TAX REDUCTION INVESTMENT PLAN,

Petitioner,

v.

ROBERT J. MATZ, Individually and on Behalf of All Others Similarly Situated,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does the Seventh Circuit's opinion denying Petitioner's interlocutory appeal conflict with any other federal appellate court decision on the issue of whether fully-vested pension plan participants, who are involuntarily terminated from participation in a qualified plan due to employer action, should be counted to determine whether a partial termination of the qualified plan has occurred?

2. Does the Seventh Circuit's consideration of the Internal Revenue Service's interpretation of the partial termination statute and corresponding Treasury regulation conflict with any decision of this Court?

3. Does the Seventh Circuit's opinion decide an important question of federal law that has not been decided by this Court but should be settled by this Court?

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RESTATEMENT OF THE CASE

A. Introduction

Petitioner's statement of the case begins with (and the Petition is premised on) the misstatement that: (a) there is a split among federal appellate courts on one of the two issues presented for review by this interlocutory appeal (Petitioner concedes there is no such split on the other issue); and (b) this appeal otherwise presents "significant and recurring" issues in need of resolution by this Court. Petition at 6. First, there is simply no such split among the federal appellate courts on any issue. Second, the questions presented for review here are not "significant and recurring" because the few federal appellate cases that have even addressed the issues have been consistently decided. Finally, this Court's review is not warranted because the interlocutory nature of this appeal dictates that any ruling on the issues by this Court will not even bring finality to this case.

B. Background Facts

Respondent, Robert J. Matz and other employees of Hamilton Investments, Inc. ("Hamilton"), a subsidiary of Household International, Inc., ("Household"), lost their jobs and the non-vested portions of their pension plan in 1994 when the assets of Hamilton were sold. Household sponsors Petitioner, a defined contribution employee pension plan, for both Household's employees and the employees of its subsidiaries, such as Hamilton. Subsequent to that transaction in 1994, Household proceeded with the sale of several other businesses and the termination of related employees and participants in Petitioner.

Petitioner is intended to be a qualified profit sharing plan under Internal Revenue Code § 401(a). Household makes matching contributions to Petitioner on behalf of those employees who have chosen to participate therein with their own contributions. All contributions by participants to Petitioner are completely vested, regardless of the length of time such participants have been employed with Household. However, until 1995, the matching contributions by Household to Petitioner on behalf of each participant were vested over a five-year period. During that five-year period, a participant would vest in the matching contributions at the rate of 20% per year. Accordingly, a participant in Petitioner would be fully vested after five years of participation. If five years of participation was not achieved by a participant, the unvested portion of Household's matching contributions were forfeited to Petitioner (and would reduce Household's future contributions to Petitioner).

In September 1995, Petitioner was amended to eliminate the five-year vesting schedule. As a result, all remaining participants in Petitioner were fully vested in their respective accounts, including Household's matching contributions to their accounts.

Respondent participated in Petitioner until the time of his termination on September 1, 1994, when Household sold Hamilton's assets. At the time of his termination, Respondent was 60% vested in the matching contributions made by Household and credited to his account. Respondent was given $27,914.10, the full amount of his vested account. The remaining unvested portion of Household's matching contributions, $7,289.92, was forfeited back to Petitioner.

C. Respondent's Lawsuit

Respondent filed the underlying class action in the United States District Court for the Northern District of Illinois in February 1996, on behalf of himself and all of those persons similarly situated. Respondent alleged that Household sold Hamilton "as part of an overall plan to refocus its business." (Complaint ¶ 12). That business plan also included the sale of Household's residential mortgage business, its mortgage servicing business, its banking business and a life insurance subsidiary. Respondent alleged that, as a result, a partial termination of Petitioner had occurred and, therefore, Respondent was entitled to the full amount of his pension account. This allegation by Respondent was based upon the provision within Petitioner that "in the case of the termination of [Petitioner] by Household International, Inc. . . . or a partial termination of [Petitioner] with respect to a group of participants, the account balance of each affected participant shall become 100% vested." Petition App. A. at 13a.[1]

D. The District Court's Rulings In Favor Of Respondent

In December 1997, Petitioner moved for partial summary judgment to exclude solely those participants in Petitioner who were terminated after September 1995, when Petitioner was amended, from both any partial termination analysis and from the plaintiff class itself. The district court denied Petitioner's motion as it concerned the partial termination

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1. Petitioner contains such a provision in order to comply with 26 U.S.C. § 411(d)(3), which requires a qualified employee benefit plan to fully vest the benefits of its participants in the event it is either fully, or partially, terminated.

analysis, but granted the motion to exclude those participants terminated after September 1995 from the plaintiff class.[2]

Petitioner moved again for partial summary judgment on December 31, 1998, on the issue of whether events occurring in multiple plan years can be considered in determining if a partial termination has occurred. That motion was denied on September 8, 1999.

E. Petitioner's Interlocutory Appeal To The Seventh Circuit

Thereafter, on November 30, 1999, the district court granted Petitioner's motion to certify the November 30, 1998 and September 8, 1999 orders for interlocutory appeal. The specific questions certified for review by the Seventh Circuit were as follows:

> 1. Whether, for purposes of determining if the Plan was "partially terminated," the court's analysis should include fully-vested employees terminated after the 1995 Plan amendment; and
>
> 2. Whether the plaintiff's partial termination analysis may include terminations that take place over multiple (here, three) plan years.

Petition App. A at 4a-5a. The Seventh Circuit granted Petitioner's request for a permissive, interlocutory appeal of these issues on January 3, 2000.

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2. Courts have generally held that termination of a number of employees does not constitute a "partial termination" unless there is a significant reduction in plan participants. In determining whether there is a significant reduction in plan participants, court often have applied a "significant percentage" test. *See Kries v. Charles O. Townley, M.D. & Associates, P.C.*, 833 F.2d 74, 79 (6th Cir. 1987). For the significant percentage test, courts look to see if a significant percentage of plan participants have been terminated. *See Kries*, 833 F.2d at 79-80.

F. The Seventh Circuit's Decision In Favor Of Respondent

The Seventh Circuit issued its opinion on September 21, 2000, affirming both orders of the district court. Petition App. A at 1a-11a. As set forth within its opinion, the Seventh Circuit reviewed the partial termination statute and its legislative history as well as the corresponding Treasury regulation. The Seventh Circuit concluded that each was ambiguous as to the standard for determining when a partial termination has occurred. Petition App. A at 5a-6a. However, the Seventh Court did conclude, after reviewing several decisions on the issue, that a "[p]artial termination is measured by using the ratio of terminated plan participants over the total plan participants." Petition App. A at 5a-7a. The Seventh Circuit also found the Internal Revenue Service's ("IRS") interpretation of the partial termination statute and Treasury regulation, as described in *Weil v. Retirement Plan Administrative Committee of the Terson Co., Inc.*, 933 F.2d 106 (2d Cir. 1991) ("*Weil III*"), to be "reasonable." Petition App. A at 8a-9a. In reaching that conclusion, the Seventh Circuit noted that "[n]either the statute, its legislative history nor the Treasury Regulation . . . differentiate between vested and non-vested participants." Petition App. A at 9a. The Seventh Circuit further determined that

> [a] finding of reasonableness is also supported by the fact that the exclusion of vested participants from the ratio calculation gives an inaccurate assessment of whether there has been a significant reduction in plan participation, the benchmark against which partial termination is measured. For the calculation to be accurate, the circumstances

> as a whole must be considered. This, we think, buttresses a finding that vested participants must be included.

Petition App. A. at 9a.

The Seventh Circuit also ruled that the district court was correct in deciding that terminations occurring over multiple plan years could be aggregated in determining whether a partial termination has occurred. Petition App. A at 10a. The Seventh Circuit observed that two other courts reached this issue, and both held that such aggregation was permissible, provided it can be shown "that the corporate events of those years were related." Petition App. A. at 10a-11a.[3] It also determined that while the partial termination statute and legislative history were silent on that issue, the partial termination regulation did provide that " 'all the facts and circumstances in a particular case' " must be considered. Petition App. A at 11a. The Circuit Court opined that

> to establish a rigid rule that only terminations in individual plan years can be counted allows an unscrupulous employer to terminate some participants in December of one year and January of the next, thereby eviscerating both the purpose of protecting employees' benefits and the purpose of prohibiting employers from reaping unfair tax benefits. We are convinced that the requirement

3. The issue of whether certain corporate events were, in fact, "related" to one another has yet to be decided and is not before this Court. Neither the district court nor the Seventh Circuit has reached that issue. Petition App. A at 11a, 36a-37a. Indeed, the district court made clear that such a factual determination "is not ripe for decision." Petition App. A at 36a.

> that the multiple year terminations be proven related prevents a plaintiff from gaining undue advantage too.

Petition App. A at 11a.

On November 6, 2000, the Seventh Circuit denied Petitioner's petition for rehearing.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT'S RULING DOES NOT CONFLICT WITH ANY OTHER RULING ISSUED BY A FEDERAL APPELLATE COURT

As a threshold matter, there is no compelling reason for this Court to grant the Petition. Quite simply, the Seventh Circuit's denial of Petitioner's interlocutory appeal does not conflict with the opinion of any other federal appellate court which considered the issues presented here for review.[4]

As to the first issue decided by the Seventh Circuit (*i.e.*, whether to count fully-vested plan participants who are involuntarily terminated in determining whether a partial termination has occurred), Petitioner combines patent illogic and wishful thinking in contending that the decision of the Seventh Circuit (and the Second Circuit's decision in

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4. Even Petitioner concedes, as it must, that there is no split among the federal appellate courts with respect to the second issue decided by the Seventh Circuit (*i.e.*, whether the partial termination analysis may include terminations that take place over multiple plan years). Accordingly, it is undisputed that review of that issue is unnecessary.

Weill III) is "directly" at odds with the decision in *Babb v. Olney Paint Co.*, 764 F.2d 240 (4th Cir. 1985).[5]

Significantly, although Petitioner premises its entire "conflict" argument on the Fourth Circuit's decision in *Babb*, Petitioner barely discusses the facts or holding of the case and fails to make even a cursory attempt to demonstrate how the decisions of the Seventh and Fourth Circuits are in conflict with one another. Instead, Petitioner asks this Court to rely *solely* upon Petitioner's bald assertion that such a conflict exists, apparently in hopes of creating an issue worthy of writ consideration. However, even the most

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5. Petitioner also contends that the Seventh Circuit's ruling directly conflicts with a nine-year-old decision rendered by the United States District Court for the Southern District of Texas in *In re Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991), *aff'd on other grounds sub nom. Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066, 115 U.S. 1699 (1995). Although Respondent does not dispute that the Seventh Circuit's ruling conflicts with the previous ruling issued by the district court in *In re Gulf Pension Litigation*, Respondent submits that such a conflict is not an appropriate or relevant consideration for granting *certiorari* and should not be considered by the Court. *See* SUP. CT. R. 10. Moreover, and as will be demonstrated more fully herein, Petitioner's position cannot be reconciled with the decision in *In re Gulf Pension Litigation*. Indeed, Petitioner has, at all times, contended that vested participants should be excluded from *only the numerator* of the equation used to determine if the plan has been reduced by a significant percentage. Petition App. A at 7a. However, the decision of the district court in *In re Gulf Pension Litigation* held that vested plan participants should be excluded from *both the numerator and the denominator* in determining whether a "significant percentage" of plan participants have been terminated. 764 F. Supp. at 1165 n.10. Quite clearly, the contention advanced by Petitioner cannot be reconciled with the holding in *In re Gulf Pension Litigation*.

superficial reading of *Babb* shows that no such conflict can conceivably be said to exist.

Petitioner claims that the Fourth Circuit considered only non-vested participants for the purpose of the partial termination analysis. Petition at 13. However, the Fourth Circuit did *not* even address, let alone decide, the issue of whether fully-vested plan participants are to be included in a partial termination analysis. Contrary to Petitioner's assertion that "the court considered only participants who were not fully vested" (Petition at 13), that issue was, quite simply, not before the Fourth Circuit. The mere fact that the Fourth Circuit affirmed a district court's finding of no partial termination as a result of a reduction in plan participation of non-vested employees, does not transform the opinion in *Babb* into a decision that "directly" conflicts with the Seventh Circuit's ruling that fully-vested plan participants are counted to determine whether a partial termination has occurred.

In *Babb*, the employer, Olney Paint Company, spun off one of its divisions on November 30, 1981, and transferred the assets of that division to a newly-formed entity. As of November 1981, all of the employees in the division that was spun off participated in Olney Paint's profit sharing plan and pension plan. *Babb*, 764 F.2d at 242. Those employees were faced with termination if they did not resign from Olney Paint and accept employment with the new entity. Sixteen employees accepted employment with the newly-formed entity. The Fourth Circuit noted that two of the employees were fully-vested in the plans. The percentage of all participants excluded from future participation, including those fully-vested, was 14.7%; the percentage of non-fully-vested participants excluded from future participation was

Petitioner reasons that, although the Seventh Circuit never once mentioned this Court's decision in *Chevron*, it "clearly gave *Chevron* deference to the [IRS] amicus curiae brief submitted to the Second Circuit in *Weil III*." Petition at 17. While there is no evidence that the Seventh Circuit afforded the IRS' position such *Chevron* deference or did anything other than note the IRS' position was "reasonable" in light of the language of the partial termination statute and Treasury regulation, such deference, if it had been afforded, would have been proper.

Every court that has examined the partial termination statute and corresponding Treasury regulation to determine whether fully-vested plan participants are to be included in the partial termination analysis has found the language of both to be ambiguous and silent on the issue. Petition App. A at 7a; *Weil III*, 933 F.2d at 110. Accordingly, pursuant to *Auer*, judicial deference should be afforded the IRS' interpretation of the partial termination statute and Treasury regulation, which interpretation is entirely consistent with the legislative purpose and history of the statute.

Recognizing that *Auer* is fatal to its Petition, Petitioner ignores this Court's opinions and makes the truly remarkable assertion that *Auer* simply "cannot be reconciled with *Christensen*." Petition at 18 n.9. Petitioner makes this assertion even though this Court, in *Christensen*, *specifically reconciled its decision in Auer with its decision in Christensen*:

> In *Auer*, we held that an agency's interpretation of its own regulation is entitled to deference. [Citation.] But *Auer* deference is warranted only when the language of the regulation is ambiguous.

> The regulation in this case, however, is not ambiguous — it is plainly permissive. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation. Because the regulation is not ambiguous on the issue of compelled compensatory time, *Auer* deference is unwarranted.

Christensen, 529 U.S. at 588, 120 S. Ct. at 1663.

Accordingly, despite Petitioner's contention to the contrary, Justice Thomas, writing for the majority of this Court in *Christensen*, easily reconciled the two cases in language applicable to this case. Quite simply, where a regulation is ambiguous (like here), deference is warranted under *Auer*. On the other hand, when the agency's position is clearly contrary to the unambiguous language of a regulation (like *Christensen)*, no such deference is warranted. By contending that the two cases cannot be reconciled, and making no attempt to distinguish *Auer*, Petitioner concedes the application of *Auer* to this case.

Moreover, just as in *Auer*, the IRS' interpretation of the partial termination statute and Treasury regulation was not made in response to a specific taxpayer request under a specific fact pattern, but was, instead, an explanation of the agency's official and long-standing position. *Weil III*, 933 F.2d at 109-11. *See also* Section 252(7) of the Internal Revenue Manual, 7753, Plan Termination Handbook (April 20, 1990) (stating that the IRS takes the position that fully-vested plan participants are counted for purposes of a partial termination analysis). The Petitioner's contention (Petition at 8) that the IRS has not been consistent in its position is

12.84%. *Id.*[6] Apparently, the district court relied on the 12.84% figure to find that a partial termination of the qualified plan had not occurred. *Id.* at 243. Without any discussion whatsoever of whether fully-vested employees are to be counted in a partial termination analysis or whether the district court properly excluded fully-vested participants from the analysis, the Fourth Circuit affirmed the district court's finding that no partial termination had occurred, holding only that such a finding was "not clearly erroneous." *Id.* at 244.[7]

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6. It is generally accepted that a 20% or more reduction in a pension plan is "significant" for purposes of determining whether a partial termination has occurred. *E.g.*, *Halliburton Co. v. Commissioner of Internal Revenue*, 100 T.C. 216, 237 (1993), *aff'd without opinion*, *Halliburton v. Commissioner*, 25 F.3d 1043 (5th Cir. 1994), *cert. denied sub nom. Nash v. Halliburton Co.*, 513 U.S. 989, 115 S. Ct. 486 (1994).

7. Petitioner further asserts that, in addition to the Fourth Circuit, "perhaps the Fifth [Circuit]" has decided the issue in conflict with the Seventh and Second Circuits. Petition at 16. That assertion is baseless, for not one of the Fifth Circuit decisions relied upon by Petitioner can be fairly read in such a manner. In *Halliburton Co.*, the United States Tax Court expressly stated that "it need not decide" whether fully-vested plan participants should be included in a partial termination analysis. 100 T.C. at 244. Thereafter, the Fifth Circuit affirmed the decision of the tax court *without opinion*. *Halliburton Co.*, 25 F.3d at 1043. Likewise, in *Borst*, the Fifth Circuit expressly stated that it did *not* consider the district court's ruling that a partial termination had occurred and, therefore, that ruling "is not conclusive between the parties." *Borst*, 36 F.3d at 1314 n.11. Even more damning to Petitioner's assertion is the decision in *Morales v. Pan American Life Insurance Co.*, 914 F.2d 83 (5th Cir. 1990). There, the Fifth Circuit *affirmed* the district court's finding that no partial termination had occurred. Among its many other rulings, the district

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In reality, and as stated by the Seventh Circuit, only two federal appellate courts — the Second and the Seventh — have directly addressed and ruled on the issue of whether fully-vested plan participants who are involuntarily terminated from participation in a qualified plan due to employer action should be counted to determine whether a partial termination of the qualified plan has occurred. Those two courts have agreed that such fully vested participants should be counted.

Specifically, in *Weil III*, the Second Circuit held that fully-vested plan participants who were involuntarily terminated from future participation should be counted to determine whether a partial termination of the qualified plan has occurred. *Id.* at 110-11. In the case below, the Seventh Circuit also held that fully-vested plan participants must be included in determining whether a partial termination of the

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court held that ***both vested and non-vested participants who were terminated from future plan participation must be considered for the purpose of a partial termination analysis***. Counting both vested and non-vested participants, the district court found that there was not a significant percentage of participants terminated from the plan and that, consequently, no partial termination had occurred. *Morales v. Pan American Life Insurance Co.*, 718 F. Supp. 1297, 1302-303 (E.D. La. 1989). On appeal, the Fifth Circuit upheld the district court's decision that no partial termination had occurred. *Morales*, 914 F.2d at 86. Although Respondent does not contend that the Fifth Circuit has ruled on the issue, under the "logic" used by Petitioner (*i.e.*, when a Circuit Court generally affirms a district court's partial termination findings, it also specifically affirms the district court's inclusion or exclusion of vested participants), the Fifth Circuit has clearly ruled in ***harmony*** with the Seventh Circuit on the issue of inclusion of vested participants. Accordingly, there is no conflicting Fifth Circuit decision. To imply otherwise is misleading.

plan has occurred. Petition App. A at 9a. Further, the IRS, the agency responsible for enforcing the partial termination statute and corresponding Treasury regulation, also takes the position that fully-vested plan participants who are involuntarily terminated from future plan participation by virtue of employer action are counted to determine whether a partial termination has occurred. *Weil III*, 933 F.2d at 110-11.

There are *no* conflicting decisions among the federal appellate courts (or the IRS) on the question of whether fully-vested plan participants are counted for the purpose of a partial termination analysis. Thus, pension plans with participants in different geographical areas are not, as Petitioner contends, "subject to different directives." Petition at 16. Because review by this Court of this interlocutory appeal on this issue is unnecessary, the Petition should be denied.

Similarly, and as the Petitioner has conceded by its silence, there are also no conflicts in the federal appellate courts concerning the second issue decided by the Seventh Circuit (*i.e.*, whether terminations occurring over multiple plan years may be aggregated for purposes of determining whether a partial termination has occurred). Accordingly, review by this Court on that issue is equally unnecessary.

II. THE SEVENTH CIRCUIT'S CONSIDERATION OF THE IRS' INTERPRETATION OF THE PARTIAL TERMINATION STATUTE AND CORRESPONDING TREASURY REGULATION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

Petitioner next argues that because the Seventh Circuit considered the position of the IRS in interpreting the partial termination statute and corresponding Treasury regulation, its opinion somehow conflicts with a decision of this Court. The linchpin of that argument is Petitioner's contention that certain decisions made by this Court over the past three years regarding the level of deference to be given to an agency's interpretation of its regulations "cannot be reconciled" (Petition at 18 n.9), even though this Court has expressly said they can be reconciled. Because the Seventh Circuit's consideration of the IRS' position is appropriate under this Court's decisions, and because the decisions, as this Court found, can be easily reconciled with each other, this attempt by Petitioner to create a conflict must also fail.

In *Auer v. Robbins*, 519 U.S. 452, 457-63, 117 S. Ct. 905, 909-12 (1997), this Court held that an agency's interpretation of its own regulation — even if that interpretation is set forth in an *amicus curiae* brief — is entitled to the kind of deference described in *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984), when the language of the regulation is ambiguous or silent as to the question at issue. Consistent with those decisions, in *Christensen v. Harris County*, 529 U.S. 576, 120 S. Ct. 1655 (2000), this Court held that a court need not give *Chevron* deference to an agency's opinion letter when that opinion letter is at odds with an unambiguous regulation.

incorrect. The IRS has *never* published a formal ruling which states that fully-vested participants are not to be included in the partial termination analysis. Nor has the IRS ever taken a litigation position otherwise at odds with such a position. Indeed, Petitioner can only point to a 1981 private letter ruling issued by a local IRS district office, indicating that only non-vested participants are taken into account in a partial termination analysis, which ruling the IRS stated was issued in error and contrary to its long-held position. *Weil v. Retirement Plan Administrative Committee of the Terson Co., Inc.*, 913 F.2d 1045, 1050 (2d Cir. 1990) ("*Weil II*"), *vacated in part on other grounds on rehearing, Weil III*; *Weil III*, 933 at 109-111.[8]

Further, Petitioner makes much of the fact that the IRS's interpretation of the partial termination statute and Treasury regulation was not the product of formal " 'notice-and-comment' rulemaking." Petition at 16. According to Petitioner, "[a]n agency interpretation stated in an amicus brief clearly is not the kind of interpretation to which *Chevron* deference is due." Petition at 17. Such a contention is in direct conflict with this Court's decision in *Auer*, which involved an amicus brief.

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8. Petitioner also argues that the IRS' position is not consistent because Form 5310, Application for Determination for Terminating Plan, asks for the number of total participants terminated and the number terminated without full vesting. This argument is meritless. As stated in the instructions for Form 5310, "*to request a determination as to the plan's qualification status for partial termination, file Form 5300 . . . [d]o NOT file Form 5310.*" (Emphasis in original). Internal Revenue Service Instructions for Form 5310 (revised June 1997), Application for Determination for Terminating Plan at 1. Thus, Form 5310 is completely irrelevant to the issue at hand.

Finally, unlike *Christensen*, the IRS' interpretation is not at odds with the language of the Treasury regulation itself, the partial termination statute or its legislative history. The legislative history of the partial termination statute states that "[e]xamples of a partial termination might include, under certain circumstances, a large reduction in the work force or a sizable reduction in benefits under the plan." H.R. Rep. No. 807, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4670, 4731; S. Rep. No. 383, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4890, 4935. The phrase "large reduction in the work force" is without reference to a participant's vesting status. The broad, all-inclusive language of the partial termination regulation (*e.g.*, examine "all the facts and circumstances," examine a "group of employees who have been previously covered by the plan," *etc.*) supports the IRS' interpretation. Finally, various IRS Revenue Rulings and General Counsel Memorandums have embraced the all-inclusive language of the partial termination statute and the IRS' interpretation of it. *Weil III*, 933 F.2d at 107 n.1, 109-111.[9] For all of the above reasons, the IRS' interpretation of the partial termination statute and corresponding Treasury regulation is entitled to judicial deference under the standards set forth in *Auer*.[10]

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9. An IRS position articulated in a Revenue Ruling is entitled to considerable weight. *United States v. Wisconsin Power & Light Co.*, 38 F.3d 329, 334 (7th Cir. 1994). Further, General Counsel Memorandums issued by the IRS may be helpful in interpreting the tax code. *Id.* at 334.

10. In addition to *Auer*, Petitioner's contention also completely ignores various other decisions of this Court. *E.g.*, *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 2386 (Cont'd)

It is clear, therefore, that consideration of the IRS' interpretation of the partial termination statute and corresponding Treasury regulation by the Seventh Circuit does not conflict with any decision of this Court.

III. PETITIONER HAS FAILED TO DEMONSTRATE ANY IMPORTANT QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THIS COURT

Finally, Petitioner contends that even if the Seventh Circuit's opinion does not conflict with any federal appellate court decision or the decisions of this Court, the "lower courts are struggling mightily" with the issue of partial termination, and that "the lower courts need the prompt assistance of this Court. . . ." Petition at 19. However, as Respondent has already demonstrated, and as Petitioner's brief clearly shows, this simply is not so. Respondent respectfully submits that Petitioner has conceded as much by offering no evidence of this "struggle" and instead is simply rehashing the arguments both lower courts found unpersuasive. Despite its dramatic

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(Cont'd)

(1994); *Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-90, 112 S. Ct. 551, 555-56 (1991) (agency's reasonable, consistently-held interpretation of its own regulation is entitled to deference); *Stinson v. United States*, 508 U.S. 36, 44, 113 S. Ct. 1913, 1919 (1993) (as long as an agency's interpretation of its own regulation does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S. Ct. 1835, 1850 (1989) (same); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 1217 (1945) (administrative interpretation of its regulation is controlling unless it is plainly erroneous or inconsistent with the regulation).

plea for guidance by this Court, Petitioner, in a moment of candor, admits that its argument is really that "the decision of the court below is simply wrong." Petition at 23. The decision is only "wrong" because it goes against Petitioner. In any event, such a contention is not a basis for review on a writ of *certiorari*. *See* SUP. CT. R. 10.

There were only two issues certified for review before the Seventh Circuit. The first concerned whether fully-vested employees should be included in a partial termination analysis. On that issue Petitioner cites this Court to only *three* decisions, *Weil III*, *Halliburton Co.* and *In re Gulf Pension Litigation*, none of which support its position.[11] The paucity of decisions relied upon by Petitioner belies its claims of federal courts "struggling mightily" with this issue in "recurring" cases. No such struggle exists and, therefore, it is not necessary for this Court to address this issue.

The second issue certified for review before the Seventh Circuit concerned whether a partial termination analysis may include terminations that take place over multiple plan years. Here, again, Petitioner is only able to muster the *same three* decisions. This is clearly no surprise. Indeed, the Seventh Circuit itself noted that "this issue has been addressed by *only two other courts (excluding the District Court below)*

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11. To be fair, it should be noted that Petitioner has cited to a number of other decisions. Petition at 21-22 n.11. In fact, Petitioner has referenced several decisions, each for the proposition that "[f]ederal courts consistently have held that a partial termination occurs if there has been a permanent reduction of a 'significant percentage' of the plan participants because of a major corporate event." Petition at 21-22 n.11. That proposition, however, is undisputed between the parties. Moreover, that proposition was never at issue in the Seventh Circuit. Nor is it as issue now.

Respectfully submitted,

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Indeed, such classification rulings "merely interpret[] and appl[y] Customs laws to 'a specific set of facts.' " *Mead Corp.*, 185 F.3d at 1307, *quoting* 19 C.F.R. § 177.1(d)(1)(1998). Here, the IRS' interpretation of the partial termination statute and Treasury regulation was not issued so as to apply to only a specific set or facts. To the contrary, that interpretation was issued to assist the Circuit Court in *Weill III* by explaining the long-standing position of the IRS on the issue of partial terminations. As such, there is no similar question before this Court in *Mead Corp.* As such, there is, then, no reason for this Court to delay ruling on this Petition.

and both have found that it is permissible to aggregate terminations for multiple years." (Emphasis added). Petition App. A at 10a. Again, the absence of such cases belies Respondent's dramatic claim of a "mighty struggle" on this issue among the federal appellate courts and again suggests this Court's involvement is simply not necessary at this stage.

The lower courts are not "struggling mightily" with partial terminations, nor are they in need of prompt assistance from this Court. Indeed, as has been well demonstrated, the decisions in this area of federal law are not only few in number, but also consistently decided.

Moreover, even on the merits Petitioner is unable to demonstrate that the Seventh Circuit's decision was "wrong." In fact, Petitioner has cited to no decision which supports its position. For example, Petitioner has, at all times, argued that insofar as it concerned a partial termination analysis (*i.e.*, the ratio of terminated plan participants over total plan participants), fully-vested participants should *only* be considered in the *denominator* of the equation. Petition App. A at 7a. That position has absolutely no support. Indeed, Petitioner has not cited to a *single* case which supports such a position. Even Petitioner's favorite case, *In re Gulf Pension Litigation*, never went as far as Petitioner wishes to go now. There, the district court determined that, for purposes of partial termination analysis, fully-vested participants should be excluded from both the numerator *and* the denominator, not just one-half of the equation as Petitioner contends in this case. *In re Gulf Pension Litigation*, 764 F. Supp. at 1165 n.10.

Petitioner has also, at all times, maintained that a partial termination analysis should not permit the aggregation of

terminations over multiple plan years. This position also has absolutely no support. Indeed, there is nothing in the partial termination statute or Treasury regulation that limits which plan years may be considered. Moreover, each and every court that has explicitly or implicitly addressed the issue has found that aggregation is permissible. *E.g.*, *Weil v. Retirement Plan Administrative Committee for the Terson Co., Inc.*, 750 F.2d 10, 13 n.2 (2d Cir. 1984) ("*Weil I*"); *In re Gulf Pension Litigation*, 764 F. Supp. at 1167-168.

In short, there are few cases addressing these issues and the Seventh Circuit's decision is consistent with the few federal appellate courts who have even addressed these issues. Therefore, there is no pressing need for this Court's involvement.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.[12]

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12. In addition to all of the other arguments raised by Petitioner, it has also requested that this Court "hold" this Petition "pending the decision in *United States v. Mead Corp.*, No 99-1434. Petition at (i) n.1. According to Petitioner, a similar question is before this Court in that appeal. Respondent respectfully disagrees. The issue in *Mead Corp.* concerns what degree of deference, if any, should be afforded United States Customs Service classification rulings which implicitly interpret certain provisions of the Harmonized Tariff Schedules of the United States. Unlike the IRS' interpretation of the partial termination statute and Treasury regulation, the classification rulings at issue in *Mead Corp.* were *not* "intended to clarify the rights and obligations of importers beyond the specific case under review." *Mead Corp. v. United States*, 25 F.3d 1304, 1307 (Fed. Cir. 1999). (Cont'd)